In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-14

JONATHAN O. COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL, ET AL.,
APPELLANTS,

v.

LUCRETIA PETEROS RICHARDSON,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

ROBERT H. QUINN,
Attorney General,
WALTER H. MAYO III,
Assistant Attorney General
373 State House
Boston, Mass. 02133
Attorneys for Appellants

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutory Provision Involved	2
Question Presented	3
Statement of the Case	3
Summary of Argument	5
Argument	6
I. The Oath Prescribed by Massachusetts General Laws, Chapter 264, Section 14 Is Constitutional	6
A. The Words "Oppose The Overthrow" Are Not Vague	7
B. The Oath Does Not Affect First Amendment Rights	8
II. The District Court Erred In Not Construing The Oath So As To Save It	10
III. The District Court Should Have Severed The Invalid Portion of The Oath	11
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases

Baggett v. *Bullitt*, 377 U.S. 360 . . . 7, 8

Cole v. *Richardson*, 397 U.S. 238 . . . 1, 4, 5, 8

Connell v. *Higginbotham*, — U.S. —, 29 L. Ed. 2d 418, 91 S. Ct. — . . . 8, 9, 10

Cramp v. *Board of Public Instruction*, 368 U.S. 278 . . . 7, 8, 9

Elfbrandt v. *Russell*, 384 U.S. 11 . . . 7

Keyishian v. *Board of Regents of the University of the State of New York*, 385 U.S. 589 . . . 7, 9,

	Page
Law Students Research Council v. *Wadmond*, 401 U.S. 154	10
N.A.A.C.P. v. *Button*, 371 U.S. 415	9
Schneider v. *Smith*, 390 U.S. 17	10
United States v. *Rumely*, 345 U.S. 41	10

Statutes

28 U.S.C. § 1253	2
§ 1331	3
§ 1343(3)	3
§ 2281	3
§ 2284	3
42 U.S.C. § 1983	3
Massachusetts General Laws, c. 264, § 14	2, 3, 4, 6, 11

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-14

JONATHAN O. COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL, ET AL.,
APPELLANTS,

v.

LUCRETIA PETEROS RICHARDSON,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

Opinions Below

The first opinion of the district court is reported at 300 F. Supp. 1321 (App. 13-16). The order of this Court vacating the judgment of the district court and remanding the case to the district court is reported at 397 U.S. 238. The second opinion of the district court is unreported (App. 26-29).

Jurisdiction

The reinstated judgment and injunction of the district court was entered on July 1, 1970 (App. 29-30). The claim of appeal was filed with the district court on July 31, 1970 (App. 31), and the appeal was docketed with this Court on September 29, 1970. Probable jurisdiction was noted on June 14, 1971. The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

Statutory Provision Involved

The Massachusetts statute involved is Massachusetts General Laws, chapter 264, § 14, which provides:

> Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the following oath or affirmation:—
>
> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."
>
> Such oath or affirmation shall be filed by the subscriber, if he shall be employed by the state, with the secretary of the commonwealth, if an employee of a county, with the county commissioners, and if an employee of a city or town, with the city clerk or the town clerk, as the case may be.
>
> The oath or affirmation prescribed by this section shall not be required of any person who is employed

by the Commonwealth or a political subdivision thereof as a physician or nurse in a hospital or other health care institution and is a citizen of a foreign country.

The text of the statute is found at page 513 of volume 9 of the Annotated Laws of Massachusetts (The Michie Company, 1968).

Question Presented

Is the oath required of public employees by Massachusetts General Laws, chapter 264, § 14 constitutional?

Statement of the Case

On September 30, 1968, plaintiff, Lucretia Peteros Richardson, commenced work as a research sociologist at the Boston State Hospital where the defendant, Dr. Jonathan O. Cole, is Superintendent. The hospital, in turn, is under the control of the Commonwealth's Department of Mental Health, of which the defendant, Dr. Milton Greenblatt, is Commissioner (App. 10-11).

On November 15, 1968, plaintiff was asked to subscribe to the oath required of all public employees in Massachusetts (set out *supra*). She declined to so subscribe, and on November 25, 1968 she again declined to subscribe to the oath (App. 12). Her employment was then terminated by defendant Cole.

On March 21, 1969, plaintiff commenced her civil action in the United States District Court for the District of Massachusetts. The complaint (App. 4-8) sought an injunction and damages pursuant to 28 U.S.C. §§ 1331 and 1343(3) and 42 U.S.C. § 1983. Plaintiff asked for an injunction against enforcement of the statute and damages in the nature of back pay (App. 7-8). A three judge court was convened pursuant to 28 U.S.C. §§2281 and 2284 (App.

1), a stipulation of facts was filed (App. 10-12), and, after hearing, the district court declared that the oath required of public employees by Mass. G.L. c. 264, § 14 was unconstitutional (App. 16). The defendants in the district court (appellants here) were enjoined from requiring the oath of the plaintiff as a condition of employment (App. 17). Plaintiff's request for back pay was denied (App. 16).

Defendants thereupon appealed to this Court (*Cole et al.* v. *Richardson*, No. 679, October Term, 1969) and plaintiff cross-appealed (*Richardson* v. *Cole, et al.*, No. 774, October Term, 1969). Plaintiff suggested to this Court that defendants' appeal was moot because the particular "job-slot" for which she had been hired had been subsequently filled. The defendants filed an affidavit in opposition to plaintiff's motion to dismiss and/or affirm, and on March 16, 1970 this Court entered an order vacating the judgment of the district court and remanding the case to that court for a determination on the question of mootness. 397 U.S. 238. Mr. Justice Harlan, joined by The Chief Justice, concurred in the result but stated:

> "I think it can fairly be said that subscribing to the instant oath subjected Mrs. Richardson to no more than an amenity. No First Amendment considerations, in my view, are at all involved in this case. This oath does not impinge on conscience or belief, except to the extent that oath taking as such may offend particular individuals. I also think it safe to say that the signing of the oath triggered no serious possibility of prosecution for either perjury or failure to perform the obligations of the oath...." 397 U.S. at 240-241.

Mr. Justice Douglas stated that he did "not see how one can even arguably maintain that the case is moot" and indicated that he would "note probable jurisdiction on

both appeals and put the cases down for oral argument." 397 U.S. at 242-243.

On remand, the district court held a further hearing at which a supplemental stipulation of facts was filed (App. 18-20). At the hearing, plaintiff retracted her suggestion of mootness (App. 26), and she pressed her claim for back pay which the district court had advised it would consider. After hearing evidence and arguments, the district court determined that the case was not moot with respect to the constitutionality of the oath (App. 27) but denied the claim for damages and back pay (App. 29). The judgment and injunction vacated by this Court were reinstated (App. 29-30), defendants appealed (App. 31), and this Court noted probable jurisdiction on June 14, 1971.

Summary of Argument

The district court erred in its determination that the words "oppose the overthrow" found in the second part of the Massachusetts oath are vague. The second part of the oath is a corollary of the first part which requires one to "uphold and defend" the Federal and state constitutions. The clause only tests whether the first part of the oath can be taken without reservation or evasion. The district court considered giving the clause a narrow, constitutional interpretation, and it erred in not doing so.

However, even if the oath can be considered ambiguous, it does not infringe on any First Amendment rights. It does not require a statement of belief so as to affect one's freedom of speech. Moreover, it does not affect freedom of association since no conduct is proscribed. The oath is merely a promissory oath of future application, and the subscriber is free to criticize the government and its policies and join whatever organizations he wishes.

Finally, we argue that the district court erred in not

construing the oath so as to save it, a course the district court considered but rejected, and in not severing the invalid portion of the oath from the constitutional portion.

Argument

I. The Oath Prescribed by Massachusetts General Laws, Chapter 264, Section 14 Is Constitutional.

In the district court, plaintiff argued that the entire oath prescribed by Mass. G.L. c. 264, § 14 was unconstitutional. The district court rejected the challenge to the first part of the oath which requires a public employee to "swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts. . . ." The Court stated:

> "Plaintiff makes an esoteric analysis of the phrase 'uphold and defend' from which she argues that even this part is improper. We consider this argument foreclosed by *Knight* v. *Board of Regents,* S.D.N.Y., 1967, 269 F.Supp. 339, *aff'd* 390 U.S. 36. While the obligation in *Knight* was to 'support' the constitution, traditionally the words 'support,' 'uphold,' and 'defend' may be regarded as equivalents.", (App. 14).

However, the district court did agree with plaintiff that the second part of the oath which provides that a public employee "will oppose the overthrow of the government of the United States of Ameriea or of this Commonwealth by force, violence or by any illegal or unconstitutional method" was unconstitutional. The court stated:

> "Plaintiff takes an equally esoteric word-by word approach to the second part which, if we were to follow

> it, would make almost any sentence in the English language ambiguous. A criminal statute is to be strictly interpreted, but this does not mean that common sense is to be jettisoned. In at least one aspect, however, we must agree with plaintiff's position. We find the phrase 'oppose the overthrow' fatally vague and unspecific." (App. 14).

The court went on to reason that since the word "oppose" had varying meanings, the oath was unintelligible and could not be required. The judgment and injunction of the district court declared that the oath violated "the First Amendment of the Constitution of the United States and is therefore invalid; . . . ." (App. 17).

Thus, the question before the Court on this appeal is whether the phrase "oppose the overthrow" is so vague as to make the oath unintelligible, thereby "chilling" plaintiff's First Amendment rights of free speech and association. The defendants submit that the language is not vague and that no First Amendment rights are involved.

A. *The Words "Oppose The Overthrow" Are Not Vague*

The instant oath is clearly distinguishable from the oaths struck down by this Court in *Baggett* v. *Bullitt*, 377 U.S. 360; *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589; *Elfbrandt* v. *Russell*, 384 U.S. 11, and *Cramp* v. *Board of Public Instruction*, 368 U.S. 278. The oaths involved in those cases were so-called negative or non-Communist oaths. All that the oath in the instant case requires is an affirmation of one's recognition and respect for law. The effect of the second part of the oath, which the district court thought unconstitutional, is merely to clarify an aspect of the obligation imposed by

the first portion, i.e., to support the Federal and state constitutions. The "clause does no more than test whether the first clause of the oath can be taken 'without mental reservation or purpose of evasion' . . . ." *Connell* v. *Higginbotham*, —— U.S. ——, 29 L. Ed. 2d 418, at 422, 91 S. Ct. —— (Mr. Justice Stewart, concurring in part and dissenting in part). If the language of the first part of the oath survives attack on vagueness grounds, then so should the language of the second part.

The district court seized on the possibility that the oath might be susceptible of two reasonable interpretations (App. 15). However, that was not sufficient to compel a declaration of unconstitutionality on the ground of vagueness. The vagueness test is much stricter, and is stated as either whether the terms of an oath are "susceptible of objective measurement" or whether the terms are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Cramp* v. *Board of Public Instruction, supra*, at 286; *Baggett* v. *Bullitt, supra*, at 367. Under those tests, the oath in the instant case withstands attack. If there is any ambiguity in the Massachusetts oath, it is certainly not so severe as to seriously jeopardize the ability of a state employee to conform his conduct to the requirements of the oath.

B. *The Oath Does Not Affect First Amendment Rights*

In each case in which this Court has struck down an oath, the Court has found an infringement of First Amendment freedoms. Even if the "vagueness contentions in this instance can . . . be characterized as at least colorable" (*Cole* v. *Richardson, supra*, at 240 Mr. Justice Harlan, concurring), the oath involves no First Amendment considerations. The district court did not explain in its opinion how the oath infringed plaintiff's First Amendment rights of

free speech and association. It assumed an infringement. In *N.A.A.C.P.* v. *Button,* 371 U.S. 415, at 432-433, this Court stated:

> "The objectionable quality of ... overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. ... These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. ..."

The inquiry which must be made then is to identify the "delicate and vulnerable" freedoms infringed by an oath which requires a statement that "I oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." The district court alluded to none, and we submit that no fundamental rights can be identified.

In contrast to the oaths struck down by this Court in *Cramp & Keyishian,* the Massachusetts oath does not place any limitation on a public employee's freedom of speech or association. No words or conduct are proscribed; the subscriber is free to criticize the government and its policies and to join any organization he or she pleases. The oath does not require any statement of belief. Compare *Connell* v. *Higginbotham, supra.* In the words of Mr. Justice Marshall, concurring in *Connell,*

> "a forward-looking, promissory oath of constitutional support does not in my view offend the First Amend-

ment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliations of a would-be beneficiary." *Connell* v. *Higginbotham, supra,* 29 L. Ed. 2d at 421.

See, also, *Law Students Research Council* v. *Wadmond,* 401 U.S. 154, 163-164.

In contrast to the oaths in other cases, the Massachusetts oath requires nothing more than the signing of the same unless and until there is a clear and present danger to the existence of the nation and/or the state. This interpretation is borne out by the fact that there have been no prosecutions either for perjury or for failure to live up to the terms of the oath since the oath was first enacted in 1949. Since there is no nexus between signing the oath and an infringement of First Amendment rights, the oath must be declared to be constitutional.

II. The District Court Erred in not Construing the Oath so as to Save It.

It is clear from the opinion of the district court that the court thought the oath susceptible of two interpretations — one constitutional and the other unconstitutional. Under the circumstances, the district court acted improperly in not accepting the constitutional interpretation. See *Schneider* v. *Smith,* 390 U.S. 17, 26; *United States* v. *Rumely,* 345 U.S. 41, 46. A reading of the court's opinion indicates that the court considered validating the oath by construing the statute narrowly, an error this Court can correct on this appeal by adopting the narrow construction even if the Court agrees with plaintiff that First Amendment rights are involved.

III. The District Court Should Have Severed the Invalid Portion of the Oath.

Finally, we submit that the district court, once it found the second portion of the oath unconstitutional, should have severed the offending portion rather than declaring the entire oath unconstitutional. It is clear that the court found no infirmity in the first portion of the oath, and it should have made that distinction in its judgment and injunction.

Conclusion

This Court should declare that the oath required of Massachusetts public employees by Massachusetts General Laws, chapter 264, section 14 is constitutional. The judgment of the district court should be vacated, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted,

Robert H. Quinn,
Attorney General
Walter H. Mayo III,
Assistant Attorney General
373 State House
Boston, Mass. 02133
Attorneys for Appellants

August 1971.